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Thursday, May 14, 2009

Political property and the evolution of liberty

A "liberty" (Latin *libertatis* or freedom) in the king's courts of medieval Europe usually referred something very different than it refers to now. It referred to the right of someone to deprive some other people of some of their normal rights as law-abiding subjects. In other words, it referred to a political property, a specifically limited right to coerce some set of people, usually for law enforcement or military or other political purposes. This curious meaning, in some ways quite the opposite of our modern meaning, reflects the conundrum that one person may use some freedoms to deprive another person of their freedoms. To prevent this, these "positive" freedoms to coerce can be limited to *procedural* powers by which are enforced *substantive* laws that are generally non-coercive, i.e. that generally protect only "negative" rights. English-derived common law (i.e. law in Great Britain, the Commonwealth, the United States, etc.) since at least the sixteenth century has generally accomplished this, and as we shall see it has used the flexibility of vague phrases to evolve a variety of modern negative rights.

Medieval positive liberties that could be owned included the right of a lord to hang thieves caught red-handed in his territory, the right to hold a market and run a law-merchant court, to collect taxes for the king or for oneself, to be a privateer (i.e. a pirate legitimized under the king's laws), to conquer and run a foreign territory, and so on. There were many dozens of kinds of these political properties specified in thousands of property deeds, called charters. Charters often freely bundled real property (i.e. land) with a variety of political properties over territories matching the boundaries of the real property, but on occasion political properties could be unbundled from land, and specific kinds of political property could be combined with each other in a dizzying variety of ways. Political properties could be held by individuals (as in lords of the manor, counties Palatine, the proprietary American Colonies, and many other examples) or corporations (guilds, boroughs, cities like London and York, companies like the East India Company, the corporate American colonies, and so on).

Individually owned politcal properties were generally hereditary. The king exercised his own hereditary political property, called the Realm or the Crown, from which at least in theory all other political property rights had been originally granted. As the original grantor the king retained via his courts jurisdiction over disputes involving those coercive properties, via the extraordnary or prerogative writs. Most political property rights only involved certain narrow subsets of the royal political powers, while some (such as the county Palatine) were very broad, including all royal powers within the boundaries of the county subject only to the intrusion of the king's extraordinary writs.

In the foreign relations context, in the granting of powers of naval warfare, piracy, and colonization, political property was used for offense as much as for defense. In the domestic context, justice was meted out by these privately owned courts more often than injustice, but it should be observed that breaking free of the jurisdiction of the local lord in order to come under the jurisdiction of the

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Nick Szabo

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king was, more than any other event, referred to as gaining one's "freedom". If you were the subject of a lord as well as, mostly indirectly, of the king, you were "unfree". If you were the subject of only the king and his ministers, you were "free". At least that is how the king's courts and ministers and any newspapermen that didn't want to be imprisoned for libel by the king's courts referred to it.

In their quest to usurp the political properties of the lords, boroughs, cities, and guilds to run their local courts, the king's courts used cases brought under the extraordinary writs to evolve a set of "liberties" with a different meaning: liberties the way most of us think of them, negative liberties that individuals held against these private law enforcers as subjects of the king, and thus justified removal of the cases to the king's courts. The definitions of various political properties increasingly included the procedures within which those rights to coerce had to be exercsed in order to protect the king's subjects from injustice. Thus we see, for example, over the sixteenth to eighteenth centuries the king's courts successively stripping guilds of various of their jurisdictional powers and thereby increasing the liberty of the individual to freely engage in their trade. To try to be consistent, the king's judges also often, though by no means always, respected these negative liberties themselves in order to justify by rules their usurpation of the positive liberties of rival private courts.

Many of the basic constitutional rights of individuals, for example of the rights enshrined in the U.S. Bill of Rights, descend from these efforts. The *lex mercatoria* evolved in the privately owned market courts of Western Europe. Much of this merchant law was later incorporated into the common law (the law of the king's courts) in Great Britain by merchant juries in the century leading up to the industrial revolution. At the same time, the king's courts gained a large degree of independence from both the king and the rising power of Parliament, forming a separation of powers between the executive, legislative, and judicial branches that was to be used as a model for the United States Constitution.

Lord Coke, Chief Justice of the king's court of Common Pleas under King James I in the early seventeenth century, declared in *Dr. Bonham's Case* that these common law rights could even limit the power of Parliament, but this argument came to be neglected by later courts. There has been longstanding debate over whether this argument of Coke's was a legally binding "holding" necessary to reach the verdict of the case or an unecessary "dictum" and thus not binding precedent. A similar doctrine was, however, revived in the United States based on interpreting broad statements in our Constitution such as "due process" in terms of rights derived from English common law in order to limit the powers of Congress and the President. The term "due process" comes from a series of charters that followed the Great Charter (Magna Carta). The phrase was considered largely synonymous with "the law of the land" that features in the Magna Carta, and referred to procedural rights, including the rights of political property and procedural limitations on those rights, that were considred the "common law" at that time. However the United States' courts' much later interpretation of the phrase has been far more creative and modern, including the oxymoronic phrase "substantive due process" under which rights to freedom of contract, school choice, birth control, and abortion, among other such negative personal rights, have been unearthed and applied to limit State and Federal legislative and executive powers. (More on the history of due process here). The modern British Parliament, on the other hand, is considered to have arbitrary sovereign powers, which can only be limited in certain cases by interpreting the language of its statutes in narrow ways to conform with the unwritten British constitution, i.e. its procedural common law traditions, but again with many creative modern flourishes.

In their efforts to limit locally coercive liberties by enhancing negative liberties, the king's courts fell short of consistency in some important ways. For example, a liberty of a corporation to enforce its regulations about a given subject matter (e.g. medicine, for a medical guild) in a given territory was often stripped from that corporation in a case involving a dispute between an individual and that corporation (e.g. somebody practicing medicine in the territory without permission of the guild), on the theory that "one should not be a judge in his own case." This is a very sound principle, and in the case of the guilds it led to the rise of free trade, but as the corporate barristers were quick to point out, the king's courts often did not apply this principle to themselves -- cases involving the king, which were many, remained in the king's courts. To some extent this was achieved by the independence of the king's courts, but it did not prevent these courts from gradually usurping the political property of the private courts and other privately held legal institutions and, with the generous help of Parliament and its own will to power, eventually extirpating them.

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There is a detailed analysis of many English cases involving privately owned rights to hold courts and enforce laws, including *Dr. Bonham's Case*, in my paper Jurisdiction as Property.

Posted by Nick Szabo at 10:58 PM

5 comments:

nick said...

That's a good paper, thanks for the cite. I especially like the quote "it would be...foolish not to recognize that [by our modern legal doctrines which ignore natural law] we have largely lost contact with a way of thinking characteristic of an earlier era, an era when jurists believed as a matter of course that positive law should and did stand in harmony with the law of nature." The same could be said, in even greater degree, about how we've lost touch with the idea of political property.

Our ignorance of political property is far greater than our ignorance of natural law, because natural law was a part of the Roman Law and the classical Greek and Roman philosophy taught in universities, and political property rights weren't. Our political philosophies largely come from universities, and while many of them (e.g. Locke, Nozick, etc.) take into account natural law, none of them take into account any political property rights -- those of the king generally being the only recognized, and not as what they actually were in law, property rights, but as some inherent "sovereign" rights of "government" justified in some other way than as property (divine right, "social conract", and other obsfucations). Only by studying actual legal cases from pre-mid-eighteenth century English law and the pre-Reception laws of other parts of Western Europe, and daring to overcome the instinctive Romanist ideology that has always pervaded unviersities (which were established in the first place to study the law codes of the old Roman Empire at its most totalitarian), can one unearth the crucial idea of political property.

1:29 PM

nick said...

I don't know about Koch. Maitland, while a university scholar, was a legal historian who read many legal cases about liberties and franchises, and thus can be expected to have some understanding of political property, albeit as with many of these university-based legal historians an understanding confused and obscured by the classical and Romanist ideologies of the universities. Holdsworth, from my reading, had a somewhat better understanding of such matters than Maitland.

Competition is indeed often an important effect of political property. Generally speaking, it is very productive kind of competition, similar to free market competition, if agreed to before a dispute arises, as with the merchants who chose to trade at a market court and didn't know whether they would end up as plaintiffs or defendants at the market's court in the event of a dispute. On the other hand there is a very destructive kind of competition when the choice of forum is made by the plaintiff after a lawsuit has already arisen, or after the parties already know who will be the plaintiff and who the defendant. This is often too broadly called "forum shopping." In forum shopping the plaintiffs shop for the court that will be most unjust and oppressive to the defendants.

Thus with positive, i.e. coercive, rights, competition can be quite good or quite destructive depending on whether it happens before or after the parties involved learn whether they are to be the enforcer or the enforcee. One cannot straightforwardly apply free market economic principles, which assume voluntary transactions, to political property which is coercive.

2:19 PM

Daniel A. Nagy said...

As far as I know, most of Lex Mercatoria did not evolve in Western Europe. It was imported by Arabic and Jewish traders from the Silk Road (the Central Asian network of trade routes), where most of it actually evolved.

In particular, it is often claimed that negotiable financial instruments emerged from the Quranic requirement of putting all financial obligations into writing (second sura, verse 282); the sheer existence of vast documentary evidence to all sorts of debt resulted in trading in such papers.

3:06 AM

Collin Brendemuehl said...

I would like to see (if it does not already exist) an essay regarding the nature of the U.S. Constitution as a declaration of certain private political property. e.g., speech, religious expression, property, arms, etc.
If there is one, could you point me in that diretion?

7:40 AM

nick said...

Here I wrote about the U.S. Constitution as descending from charters of political property rights, in particular political property granted to corporations. I've also written about Semayne's case, in which Chief Justice Coke discussed an inalienable political property right attaching to residences under common law. Let me know if you have further questions.

So one can think of the U.S. Constitution as granting political property to one corporation (the U.S. federal government) -- positive grants of certain enumerated powers to coerce other organizations and individuals -- and taking away some political property from others (States, formerly corporate or proprietary colonies) -- and granting some negative political property rights to individuals that serve to limit this coercion in some areas. (Under common law or natural law, English subjects arguably had these rights already, and there was thus a serious debate about whether an express Bill of Rights that purported to grant rights that were already held was necessary or proper -- but given the neglect of common law and natural rights since then, and the move to legal positivism where if it's not codified it doesn't count, it's fortunate that they were codified).

I should point out, though, that by the time of the drafting and ratification of the U.S. Constitution, most Americans and Englishmen just thought of these as generic political powers and rights, increasingly distinct from economic property rights, per the Roman law's model of purely economic property rights that had been gaining popularity since the Renaissance. Still, if you want to go behind the Constitution to understand the precedents that came before it and gave rise to it (and thus inform the meaning of the words and the methodology whereby one interprets them), one should understand political powers and rights as the prior generations of English lawyers understood them, as property.

5:31 PM

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